

In re Interest of Elijah P.

Caselaw No.

No. A-15-946

Filed on

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SUMMARY: Erika D. appeals and Joshua P. cross-appeals from the order of the separate juvenile court of Douglas County which adjudicated the parties' minor children under Neb. Rev. Stat. § 43-247(3)(a) and terminated Erika's and Joshua's parental rights. The Nebraska Court of Appeals affirm the adjudication and reverse the termination of parental rights and remand the cause for further proceedings.

Erika and Joshua are the parents of five children: Joshua P., Jr., Zion P., Isaiah P., Genesis P., and Faith P. Elijah P., born in February 2013, is the biological child of Joshua and another woman. Elijah has been under Erika's care since October 2014.

In January 2015, all of the children, including Elijah, were residing with Erika. Joshua did not reside in the home, but made occasional visits.

On January 2, Elijah was standing on the armrest of the couch and fell off, landing face first on the floor. The floor was made of "vinyl covering tile" that was placed over concrete. Elijah suffered a "knot" above his right eye that began to swell. Erika contacted Joshua about the fall. Joshua instructed her to put some ice on the injury and keep Elijah awake to monitor his condition. Joshua arrived at Erika's home a short time later and did not see any unusual activity by Elijah. Elijah did develop a black eye from the fall, but otherwise there were no observable injuries or any suspicious behavior.

On January 11, after Erika had put the children to bed, she checked on Elijah and noticed that he was lying down, but his arms were straight up in the air. He also did not respond to his name being called and did not wake up or put his arms down. Erika noticed that he appeared to be stiff.

Erika continued to monitor Elijah and a few minutes later, he stiffened again. Erika contacted Elijah's mother about the stiffness. Elijah's mother responded that he "was super stiff especially in his legs" when he was born, but it had gone away, and she thought it was unusual that the stiffness had returned. Erika felt less concerned about Elijah after hearing the report from his mother that he had experienced something similar in the past.

Around 9 p.m. Erika contacted Joshua about the stiffness and asked him to come over. Joshua researched the symptom online and what he read was not alarming to him.

When Joshua arrived at Erika's home, he also observed the stiffness in Elijah's arms and legs and attempted to awaken him. Elijah did not relax, but it appeared that he was sleeping. Joshua then told Erika to let Elijah sleep and see how he was in the morning.

Overnight, Erika monitored Elijah but he did not experience any more stiffness and appeared to be sleeping. After the older children left for school the next day, Erika heard Elijah whining. When she went to check on him she noticed that his leg was stiff and one of his eye was

open, but he was not focusing or looking at her. She then called Joshua to ask him if he would take the child to the hospital.

Joshua immediately came over and took the child to the hospital. Upon arrival, Elijah was diagnosed with a skull fracture above the right eye, a subdural hematoma, and a significant brain injury. He was taken into surgery to have the hematoma drained.

Because there was concern that the child's injuries were a result of child abuse, the police and a child abuse pediatrician were called to the hospital.

Authorities met with both Erika and Joshua who reported the same version of events and there was no "hard evidence" indicating that Elijah's injuries were intentionally caused. However, the child abuse pediatrician gave the opinion that the child's injuries were the result of nonaccidental abusive head trauma. Consequently, Erika and Joshua were arrested, and all of the children were removed from their care.

The State sought adjudication of the children and termination of Erika's and Joshua's parental rights. The State argued that the children came within the meaning of § 43-247(3)(a), that reasonable efforts to preserve and reunify the family were not required because Elijah had been subjected to "aggravated circumstances" and therefore termination of parental rights was warranted and in the children's best interests.

Erika and Joshua filed a joint motion in limine asking that the court prohibit the State from introducing opinion testimony that Elijah's injuries were intentionally inflicted unless the court first established its reliability under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The court then proceeded with a *Daubert/Schafersman* hearing to determine the admissibility of the child abuse pediatrician and concluded that the testimony satisfied the requisite standards and was therefore admissible.

Testimony from the hearing included the report from the child abuse pediatrician who concluded that Elijah's injuries were the result of two separate incidents and that both injuries were the result of inflicted blunt force trauma.

Additional testimony indicated that after the children were removed from Erika's and Joshua's care, they underwent medical evaluations and other than a few cavities and abscessed teeth the children did not appear dirty and none of them had any untreated medical conditions.

Erika assigned that the juvenile court erred in doing multiple things. Some of Erika's assignments of error challenged the juvenile court's decision to admit the child abuse pediatrician's testimony over the objection that the opinion was not reliable under the *Daubert/Schafersman* standards.

In analyzing the termination of parental rights, the Nebraska Evidence Rules do not apply and, thus, neither do the *Daubert/ Schafersman* standards. Instead, *In re Interest of Rebecka P.* indicates that due process controls and requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated.

Additionally in *In re Interest of Rebecka P.* because a parent had received notice of the

termination hearing, the parent's due process rights were not violated by the testimony of a witness. Applying that ruling to the current facts, Erika had received notice of the termination hearing and therefore the court found that the due process requirements were satisfied and the juvenile court did not err in allowing the testimony for consideration on the motion to terminate parental rights.

On statutory grounds, the court concludes that the evidence does not clearly and convincingly establish that Erika and Joshua neglected the children under § 43-929(2) or subjected them to aggravated circumstances under § 43-292(9).

When defining aggravated circumstances, the Supreme Court has cited with approval the New Jersey Superior Court, stating that where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety, and welfare of the child, they are "aggravated."

Upon review of the record, the court concludes that the evidence does not clearly and convincingly establish that Erika intentionally caused Elijah's injuries. Additionally, there was no evidence presented that Erika physically disciplined any of the children or was physically abusive.

Furthermore, there was no finding that Erika's and Joshua's delay in seeking medical attention for Elijah constituted aggravated circumstances. The court distinguished the present facts from *In re Interest of Jacquez N.* because the evidence here is not clear and convincing that on the night of January 11, Elijah was displaying obvious signs of a serious medical issue, such as seizures, so that he needed immediate medical attention.

In conclusion, the appellate court has not extended the meaning of aggravated circumstances to include a single act of negligent conduct leading to injury to a child, and the court declined to do so in this case as well. Therefore, the evidence does not support terminating Erika's and Joshua's parental rights under § 43-292(9).

In reviewing the juvenile court's finding that the State presented sufficient evidence to support termination pursuant to § 43-292(2), the court could not find that a handful of incidents, none of which resulted in permanent or serious injury to any of the children met the standard which is that the State must establish that the parental neglect was substantial and continuous or repeated. Therefore, the State has not proved statutory grounds for termination, and therefore the court reversed the termination of Erika's and Joshua's parental rights to the minor children.

Further, the court looked into the adjudication of the children under § 43-247(3)(a). The court agreed with Erika's argument that the juvenile court erred in abdicating its gatekeeping function by failing to set forth its reasoning for concluding that the child abuse pediatrician's was reliable.

The present facts are similar to *Zimmerman v. Powell* because the juvenile court's ruling did not explain why the pediatrician's testimony was reliable and met the Daubert/ Schafersman standards. For this reason, the court found that the juvenile court abdicated its gatekeeping duty and cannot say that the admission of the testimony did not affect the result of the trial. Accordingly, the testimony should not have been admitted for adjudication purposes.

Consequently, the court reversed the juvenile court's decision terminating the parental rights

and concluded that the juvenile court erred in failing to explain its reasoning for determining that the pediatrician's testimony meets the Daubert/ Schafersman, standards. The court affirmed the adjudication of the children and remand the cause for further proceedings.
